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In The

Supreme Court of the United States

October Term, 1967

No. 639

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET. AL.,

Petition For A Writ of Certiorari To
The United States Court of Appeals
For the Fifth Circuit

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1967

No.

MRS. MINNIE BRADE GLONA,
Petitioner,

versus

AMERICAN GUARANTEE & LIABILITY
INSURANCE COMPANY ET AL

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Mrs. Minnie Brade Glona, your petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit, entered in the above entitled case on June 22, 1967, which affirmed the judgment of the United States District Court for the Eastern District of Louisiana dismissing petitioner's claim for damages for wrongful death of her minor illegitimate son.

OPINIONS BELOW

FIFTH CIRCUIT. The opinion of the Court below in this case (Appendix A, infra. pp. 12-14) has not yet been reported.

DISTRICT COURT. The District Court wrote no opinion. Its judgment dated June 24, 1966 is found in the Appendix A, infra p. 15; it was not reported.

JURISDICTION

The judgment and opinion of the Court below (Appendix A, infra at p. 12) was entered on June 22, 1967. The jurisdiction of this Court is invoked under the provisions of 28 U. S. Code Sec. 1254 (1).

THE QUESTION PRESENTED

Whether the application and construction of Louisiana Civil Code, Article 2315, which grants parents the right to recover damages for wrongful death of legitimate children but denies recovery for wrongful death of illegitimate children is invalid under the Equal Protection clause of the Fourteenth Amendment to the United States Constitution.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment, Section 1, to the United States Constitution provides:

> "Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens

of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Louisiana Civil Code, Article 2315 provides as follows:

"The right to recover damages to property caused by an offense or quasi offense is a property right which, on the death of the obligee, is inherited by his legal, instituted, or irregular heirs, subject to the community rights of the surviving spouse.

"The right to recover all other damages caused by an offense or quasi offense, if the injured person dies, shall survive for a period of one year from the death of the deceased in favor of: (1) the surviving spouse and child or children of the deceased, or either such spouse or such child or children; (2) the surviving father and mother of the deceased, or either of them, if he left no spouse or child surviving; and (3) the surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving. The survivors in whose favor this right of action survives may also recover the damages which they sustained through the wrongful death of the deceased. A right to recover damages under the provisions of this paragraph is a property right

which, on the death of the survivor in whose favor the right of action survived, is inherited by his legal, instituted, or irregular heirs, whether suit has been instituted thereon by the survivor or not.

"As used in this article, the words 'child,' 'brother,' 'sister,' 'father,' and 'mother' include a child, brother, sister, father and mother, by adoption, respectively."

STATEMENT OF THE CASE

Mrs. Minnie Brade Glona brought this action for damages for the wrongful death of her illegitimate, minor child, against the insurer of the alleged tortfeasor and the alleged tortfeasor.

Petitioner was a Texas domicillary at the time of the death of her son and at the time suit was brought.

The jurisdiction of the United States District Court was based on diversity of citizenship, Article III, Section 2, U. S. Constitution, and Title 28, U. S. Code Section 1332.

The claim arose out of an automobile collision in New Orleans, Louisiana and the son of petitioner died in Harahan, Louisiana.

The decedent was never adopted or legitimated by petitioner; he was, however, informally acknowledged

by his mother, petitioner. Decedent never married and had no children whatsoever.

The district court granted summary judgment for the defendants, on the predicate that mothers may not recover for wrongful death of their illegitimate children in Louisiana under the jurisprudence of that State.

The Court of Appeals, in a per curiam decision, affirmed the judgment of the district court on June 22, 1967.

REASONS FOR GRANTING THE WRIT

The Civil Code of Louisiana, Article 2315, provides for the right of recovery for wrongful death in favor of "the surviving father and mother of the deceased, or either of them." The statute does not state "legitimate father" or "legitimate mother." The Louisiana Courts have held that the words "mother," "children" or "father" has reference to survivors of legitimates. The decedent must be legitimate in order for an ascendant to recover. See: *Vaughn v. Dalton-Lard Lumber Co.*, 119 La. 61, 43 So 926; *Jackson v. Lindholm* 84 So. 2d 101 (C.A. Orl. 1955) and *Buie v. Hester*, 147 So. 2d 733 (2 C.A. 1962).

Petitioner, being a domicillary of Texas, could have recovered for the wrongful death of her illegitimate son if she could have sued in Texas. Title 17 Vernons Texas Civil Statutes, Article 4675; *Galveston H. & S. A. Ry. Co. v. Walker*, 48 Tex. Civ. App. 52, 106 S. W. 705, 706 (1907). There would have been no reason why peti-

tioner should have legitimated or adopted her natural son from the viewpoint of Texas law.

Even Louisiana's most recent pronouncement as to the reason for denying recovery where illegitimates are involved would not apply to petitioner. *Levy v. State,* 192 So. 2d 193 (4 Cir. 1966); *cert. den.* 250 La. 25, 193 So. 2d. 530. (1967); *App. pen.,* U. S. Supreme Court, No. 508.

In *Levy* the Louisiana Court stated that the purpose of classifying illegitimates out of the provisions of Article 2315, Louisiana Civil Code, "is actually based on morals and general welfare because it discourages bringing children into the world out of wedlock." *Ibid.* 192 So. 2d 193, 195.

In Louisiana a classification has been made by the Courts (not the Legislature) in the interpretation of Louisiana Civil Code, Article 2315, which is constitutionally irrelevant,[1] and, therefore, unrecognizable, even under the *Erie* Doctrine.[2]

Nowhere in the Article, itself, is there a restricting provision declaring that only legitimate parents or legitimate children are to be included. The Article speaks

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[1]The mere state of being without funds is a neutral fact — constitutionally an irrelevance, like race, creed or color. *Edwards vs. California,* 314 U.S. 160, 184 (1941). It is suggested "that there are some differences between men which cannot constitutionally be recognized, that classifications based upon such irrelevancies are repugnant to the Constitution." Tussman and ten-Broek, *The Equal Protection of the Laws,* 37 Cal.L.Rev.341, 353 (1949).

[2]*Erie v. Tompkins,* 303 U. S. 64, 58 S. Ct. 817 (1938).

of "surviving father and mother" and not "legitimate child."

Article 27 and 178 of the Code treat of children as being "legitimate, illegitimate or legitimated." But 2315 as amended does not speak of a particular class of children nor does it speak of a particular class of parents. "The words of a law are generally to be understood in their most usual signification." *La. Civ. Code*, Art. 14.

It is not even suggested that the legislature sought to delimit Article 2315. It is only the Courts that have done so.

Denying to an illegitimate's family the right to sue for his death and injury and to allow legitimate families to do so is an arbitrary and impermissible classification set up not by the legislature but by the Courts, resulting in an unequal application of the law by the Courts.

> "When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or *applied*, single out that class for different treatment not based on reasonable classification, the guarantees of the Constitution have been violated." *Hernandez v. Texas*, 74 S. Ct. 667, 670, 347 U. S. 475 (1954), (Emphasis supplied)

The State has the right to classify, but here the State through its legislative body did not choose to classify. It is in the Courts of Louisiana that classification takes place. The legislature has never declared

a public policy that the estates of illegitimate children are not inheritable. If illegitimates have no posterity, their natural parents or either of them inherit. *La. Civ. Code*, Article 992. No difference can be made out for the survival of a wrongful death claim as between legitimates and illegitimates. If illegitimates inherit property from natural parents and vice-versa, and the claim for wrongful death is a property right (see *Buie v. Hester*, 147 So. 2d 733 [2nd Cir. 1962]) then the instant plaintiff should be able to assert her rights. Even under a constrained position, if there is to be classification, it must "always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed and can never be made arbitrarily, and without any such basis . . . Arbitrary selection can never be justified by calling it classification." *Gulf v. Ellis*, 165 U. S. 150, 155, 17 S. Ct. at 258 cited with approval and quoted in *McLaughlin v. Florida*, 379 U.S. 184, 85 S.Ct. 283, 287 (1965).

As far as purpose is concerned, an illegitimate child can be just as dependent on his mother, and vice versa, as a legitimate one. The fact that the illegitimacy rate has been on the incline certainly demonstrates this.[3] The Federal Welfare and other Federal laws have recognized this.[4]

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[3]259,400 illegitimate births in the U.S. in 1963. U.S. Census Bureau, Stat. Abstract of the U.S. 47, 51 (1965).

[4]Note, *The Rights of Illegitimates under Federal Statutes*, 76 Harv. L. Rev. 337 (1962). State laws are changing also: Like Texas, previously cited in Point I, Arizona and Oregon give full recognition and rights to illegitimates as if they were legitimate except they may not dwell with the family of their father if the father is married. Ariz. R. S. Ann. Sec. 14-206 (1956); Ore. Rev. Stat. Sec. 109.060 (1957)

The Social Security Act, 42 U.S.C. 416 (h) (2), 416 (h) (3); Veterans Legislation, 38 U.S.C. 101 (4); Foreign Service Act, 22 U.S.C. 1064 (3) all include illegitimates within their extending provisions. The Jones Act (46 U.S.C. 688) apparently does. *Civil v. Waterman,* 217 F. 2d 94 (2 C.A. 1954). The Federal Employer's Liability Act (45 U.S.C. 51) does. *Huber v. Baltimore,* 241 F.S. 646 (D. Md. 1965), and the Death on the High Seas Act (46 U.S.C. 761) does. *Middleton v. Luckenbach S. S. Co.,* 70 F. 2d 326, 330 (2 C.A. 1934).

Furthermore, Louisiana treats illegitimates equally for the purpose of its criminal law. There is no distinction between legitimate and illegitimate where incest is concerned. L.S.A.-R.S. 14:78. Kill the mother of an illegitimate, or the illegitimate, and one suffers the criminal consequence. L.S.A.-R.S. 14:29. A Louisiana illegitimate and his mother inherit from each other as was brought out above. But Louisiana draws the line at that point, and absolves the killers of illegitimates and their mothers from all civil liability. The distinction and classification is as odious as former policies of barring illegitimates from public office, preventing them from testifying, providing farcical penalties for their murderers, and denying them burial.[5]

It is submitted that the real reason of Louisiana is simply pure prejudice. Our legislature never expressed a purpose to de-classify from Article 2315 mothers of il-

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[5]See Krause, *Equal Protection for the Illegitimate,* 65 Mich. L. Rev. 477, 489 et seq. (1967).

legitimates. Most legislation in Louisiana has been to take the burden off the illegitimate family.

Nor does the fact that Louisiana Courts treat all illegitimates and parents of illegitimates equally end the judicial inquiry. *Carrington v. Rash*, 380 U. S. 89, 85 S. Ct. 775 (1965).

The classification invoked by Louisiana does not comply with the over/under inclusive test of *Skinner v. Oklahoma*, 316 U. S. 535 (1942). A mother is no less a mother if her son is illegitimate.

It must be pointed out that the Supreme Court in *Jones v. Jones*, 234 U. S. 615, 34 S. Ct. 937 (1914) took a different view in an analogous matter involving inheritance rights of "free born" as opposed to "slave born." In so far as that case may have hinged on the "equal protection" clause, petitioner urges that the case history since 1914 on that clause is in direct conflict with the *Jones* case.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the Court below is erroneous. The factor of illegitimacy is an irrelevant accident in the face of our common humanity. The present petition for a writ of Certiorari should therefore be granted.

Respectfully Submitted,

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CERTIFICATE

I certify that a copy of the foregoing application has been served upon the opposing counsel by placing same in the United States Mail, properly addressed, with adequate postage affixed thereto.

_____

BENJAMIN E. SMITH

APPENDIX A

OPINION OF THE COURT OF APPEAL

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 24,181

MRS. MINNIE BRADE GLONA,
Appellant,

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY, ET AL.,
Appellees.

Appeal from the United States District Court for the Eastern District of Louisiana.

(June 22, 1967.)

Before RIVES and DYER, Circuit Judges, and JOHNSON, District Judge.

PER CURIAM: This suit was instituted in the United States District Court for the Eastern District of Louisiana by the plaintiff, Mrs. Minnie Brade Glona, a resident of Texas, who sues the defendants, American

Guarantee & Liability Insurance Company and its insured, a resident of Louisiana, to recover for the wrongful death of her son, who died as a result of an automobile accident which occurred in the city of New Orleans in September, 1964. Defendants filed a motion for summary judgment pursuant to Rule 56, Federal Rules of Civil Procedure, on the ground that the plaintiff's deceased son, although informally recognized by the plaintiff, was her illegitimate son and that, therefore, plaintiff had no cause of action for his death.[1]

Plaintiff, in opposition to the motion for summary judgment, acknowledged that under the Louisiana law she had not right of action for the death of her illegitimate child but urged that to so restrict Article 2315 of the Louisiana Civil Code violates the equal protection provisions of the Fourteenth Amendment to the Constitution of the United States. Upon such submission, the District Court granted the defendants' motion for summary judgment.

Plaintiff argues for the first time on this appeal that the granting of the Rule 56 motion was erroneous for the reason that the laws of Texas should be applied in determining whether or not she has a right of action

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[1]The Civil Code of Louisiana, Article 2315 provides for the right of recovery for wrongful death in favor of "the surviving father and mother of the deceased or either of them." The statute does not state "legitimate father" or "legitimate mother." The Louisiana courts have held that the words "mother," "children," and "father" have reference to survivors of legitimates. The decedent must be legitimate in order for an ascendant to recover. See *Vaughn v. Dalton-Land Lumber Co.*, 119 La. 61, 43 So. 926; *Jackson v. Lindholm*, 84 So. 2d 101 (C.A. Orl. 1955), and *Buie v. Hester*, 147 So. 2d 733 (2 C.A. 1962).

against defendants.[2] Plaintiff's theory that the law of Texas should be applied even though the injury and death occurred in Louisiana is that, by reason of plaintiff's domicile, Texas has a more significant relationship with the occurrence than Louisiana. Such an argument at this point is foreclosed. Upon being met with defendants' motion for summary judgment, plaintiff was authorized by Rule 56 to develop factually that the law of the domicile had a more significant relationship with the occurrence than the *lex loci delicti.* Plaintiff failed to do this, and such an issue was not raised upon the submission to the District Judge.

As to plaintiff's argument that the construction by the Louisiana courts of Article 2315, Civil Code of Louisiana, so restricts said provision that it violates the equal protection clause of the Fourteenth Amendment, this Court is clear to the conclusion that the Fourteenth Amendment does not prohibit States from Classification but only prohibits classification upon an unreasonable basis. It cannot be said that the classification here by the Louisiana courts is unreasonable. *Morey v. Doud,* 354 U.S. 347.

The motion for summary judgment was properly granted, and the action of the District Court is

AFFIRMED.

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[2]The Texas wrongful death statute, Title 17 Vernon's Texas Civil Stat. Art. 4675, as the same has been construed by the Texas courts, would authorize an action such as plaintiff's for the wrongful death of her illegitimate son.

OPINION OF DISTRICT COURT

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA
NEW ORLEANS DIVISION
DIVISION "B"

No. 15,974

CIVIL ACTION

MRS. MINNIE BRADE GLONA

versus

AMERICAN GUARANTEE & LIABILITY INSURANCE COMPANY and HENRY O. MacDONELL

JUDGMENT

The Court having, on June 22, 1966, granted the motion of defendants for summary judgment;

ACCORDINGLY, IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of defendants, American Guarantee & Liability Insurance Company and Henry O. MacDonell and against the plaintiff, Mrs. Minnie Brade Glona, dismissing said plaintiff's suit with costs.

Dated at New Orleans, Louisiana on this 24th day of June, 1966.

(Signed) A. DALLAM O'BRIEN, JR.,
A. DALLAM O'BRIEN, JR.
Clerk